STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

ANTHONY HENRY and KEITH WHITE,
Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191, MICHAEL AARON
Defendants/Appellants.

and

BRUCE RUEDISUELI,
Defendant.
_____/

Supreme Court No: 145631
Court of Appeals No: 302373
Wayne County Circuit Court No: 10-00384-CD

MICHAEL RAMSEY and GLEN DOWDY,
Plaintiffs/Appellees,

vs.

LABORERS LOCAL UNION 1191 d/b/a ROAD CONSTRUCTION LABORERS OF MICHIGAN LOCAL 1191, MICHAEL AARON,
Defendants/Appellants,

and

BRUCE RUEDISUELI,

Defendant.
_____/

Supreme Court No: 145632
Court of Appeals No: 302710
Wayne County Circuit Court No: 10-004708-CD

DEFENDANT BRUCE RUEDISUELI'S BRIEF IN SUPPORT OF APPELLANTS' APPEAL

ORAL ARGUENT REQUESTED

JOEL B. SKLAR (P38338)
Attorneys for Plaintiffs/Appellees
615 Griswold, Suite 1116
Detroit, MI 48226
(313) 963-4529

CHRISTOPHER P. LEGGHIO (P27378)
Attorney for Defendants/Appellants Laborer Local 1191 and Michael Aaron
306 S. Washington Ave., Suite 600
Royal Oak, MI 48067-3937
(248) 398-5900

ROBERT J. DINGES (P12799)
Counsel for Plaintiffs/Appellees
Henry and White
615 Griswold, Suite 1117
Detroit, MI 48226
(313) 963-1500

Ben M. Gonek (P43716)
Counsel for Plaintiffs/Appellees
Ramsey and Dowdy
101 W. Big Beaver Rd., 10th Floor
Troy, MI 48084
(248) 457-7122

LAW OFFICES OF J. DOUGLAS KORNEY
By: J. Douglas Korney (P16155)
Attorney for Defendant/Appellant Bruce Ruedisueli
32300 Northwestern Highway, Suite 200
Farmington Hills, MI 48334
(248) 865-9214

/

DEFENDANT BRUCE RUEDISUELI'S
BRIEF IN SUPPORT OF APPELLANTS' APPEAL

LAW OFFICES OF J. DOUGLAS KORNEY
By: J. Douglas Korney (P16155)
Attorney for Defendant/Appellant Bruce Ruedisueli
32300 Northwestern Highway, Suite 200
Farmington Hills, MI 48334
(248) 865-9214

Dated: April 12, 2013

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT RE: JURISDICTION

This is an appeal from a decision of the Michigan Court of Appeals dated July 3, 2012 which affirmed orders of the Wayne County Circuit Court issued on January 13, 2011 and February 13, 2011 denying motions for summary disposition. This Court granted leave, pursuant to an application filed by Appellants Laborers Local Union 1191 and Michael Aaron, in an Order dated February 6, 2013. Jurisdiction is proper under MCR 7.301(A)(2) and MCR 7.302.

STATEMENT OF QUESTIONS INVOLVED

1. Whether Plaintiffs' claims under Michigan's Whistleblower Protection Act, M.C.L. § 15.361 *et seq.* ("WPA") are preempted under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA")?

   The trial court answered "no"
   The Court of Appeals answered "no"
   Defendant Ruedisueli submits that the answer is "yes"

2. Whether Plaintiffs' WPA claims are preempted under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* ("NLRA") and/or the Garmon preemption doctrine?

   The trial court did not answer this question
   The Court of Appeals answered "no"
   Defendant Ruedisueli submits that the answer is "yes"

3. Whether Michigan courts lack subject matter jurisdiction over Plaintiffs' WPA claims due to preemption by federal labor law?

   The trial court answered "no"
   The Court of Appeals answered "no"
   Defendant Ruedisueli submits that the answer is "yes"

4. Whether, regardless of the public policy involved, the NLRA or LMRDA preempt Michigan's Whistleblower Protection Act (WPA), if the challenged conduct actually or arguably falls within the jurisdiction of the NLRA or LMRDA?

   The trial court did not answer this precise question
   The Court of Appeals answered "no"
   Defendant Ruedisueli submits that the answer is "yes"

5. Whether a union employee's report to a public body of suspected illegal activity or participation in an investigation thereof is of only peripheral concern to the NLRA or the LMRDA so that the employee's claims under the WPA are not preempted by federal law?

   The trial did not answer this question
   The Court of Appeals answered "yes" if the report was made to an agency other than the NLRB
   Defendant Ruedisueli submits that the answer is "no" where, as here, the report was part of "concerted activity" under the NLRA

6. Whether the state's interest in enforcing the WPA is so deeply rooted that, in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act?

The trial did not answer this question
The Court of Appeals did not answer this specific question
Defendant Ruedisueli submits that the answer is "no"

SUMMARY OF ARGUMENT

Defendant Bruce Ruedisueli ("Ruedisueli") files this brief to concur in and support the appeal filed in this Court by Defendant/Appellants Michael Aaron ("Aaron") and Laborers' Local 1191 d/b/a Road Construction Laborers of Michigan Local 1191 (the "Union") in these consolidated cases. The arguments and relief requested in Appellants' appeal apply equally to Ruedisueli as they do Appellants. Ruedusueli, during the time period relevant to this action, was the President of the Union while Aaron was the Union's Business Manager. Plaintiffs' claims against Ruedisueli under the Whistleblower Protection Act, M.C.L. 15.361, *et seq.* ("WPA"), at issue in this appeal, are premised upon the same underlying factual allegations as Plaintiffs' WPA claims against Aaron and the Union. Ruedisueli will concur in Appellants' arguments and adds and/or emphasizes the arguments and points presented herein.

This case involves traditional labor disputes subject to the exclusive jurisdiction of federal labor laws and the National Labor Relations Board. As such, Plaintiffs' entire Complaint in Case No. 302373 and all but one of the claims by one of the Plaintiffs in Case No. 302710 (Count II of the Complaint -- which was not part of the motion for summary disposition) should have been dismissed by the trial court because such claims outside the court's subject matter jurisdiction.

Plaintiffs' WPA claims are preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA") for reasons set forth in the Michigan Court of Appeals' decision in Packowski v United Food and Commercial Workers Local 951, 289 Mich.App. 132, 796 N.W.2d 94 (2010). Packowski was correctly decided and the material facts in the present case are on point with those in Packowski. Application of Packowski and the cases adopted therein make clear that the summary disposition motions at

issue should have been granted in their entirety. The Court of Appeals erred in this case by failing to so hold, as discussed below.

Plaintiffs' WPA claims also are preempted under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* ("NLRA") under the doctrine enunciated by the United States Supreme Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The Court of Appeals erred in this case by holding that Plaintiffs' WPA claims are a "peripheral concern" of the NLRA and therefore not Garmon preempted, as discussed below. 2012 WL 2579683 at p. 3.

Summary of Garmon Preemption Argument

The National Labor Relations Board ("NLRB" or the "Board") has the singular power to resolve disputes arising under the NLRA. The Garmon Court held that when an activity "arguably" is protected under § 7 of the NLRA or prohibited under § 8 of the NLRA both the States and the federal courts "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. Plaintiffs' claims of retaliatory discharge under the WPA in this case are preempted by federal law and must be dismissed because they are based on conduct subject to the exclusive jurisdiction of the NLRB under the Garmon doctrine.

Garmon establishes a broad rule of preemption. Activities need only "arguably" be protected or prohibited under the NLRA to give rise to the NLRB's exclusive jurisdiction. State law claims based on such activities are Garmon preempted unless the argued basis for the NLRB's jurisdiction has been "authoritatively rejected" by the courts or the Board. Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 395 (1986). It is axiomatic that activities and claims that arguably "could" have been presented to the NLRB are preempted *whether or not* they in fact were raised with the NLRB. The Court of Appeals erred in this case

when it declined to find preemption for the reason that Plaintiffs did not actually present their complaints to the NLRB. *See* 2012 WL 2579683, at p. 4.

The NLRA protects certain activities in § 7 and prohibits others in § 8. Section 7 protects, among other things, the right of employees to engage in "*concerted activities*" for "*mutual aid or protection*" and other union-related matters. 29 USCS § 157. Section 8 prohibits employers from violating the rights of employees set forth in § 7 and characterizes such violations as "unfair labor practices." 29 U.S.C. § 158. Section 8 thus prohibits and makes it an "unfair labor practice" for employers to terminate or otherwise discriminate against employees for engaging in "concerted activities."

NLRA-protected concerted activities include a broad range of activities conducted for mutual aid or protection and other matters. It includes complaints or activities based on a perceived violation of a collective bargaining agreement or the process of attempting to enforce that agreement. NLRB v City Disposal Sys. Inc., 465 U.S. 822, 839-840 (1984). It includes "the activities of employees who have joined together in order to achieve common goals." *Id.* at 830. Such activities "need not expressly refer to a collective bargaining agreement." *Id.* at 839-40. An honest invocation of a collectively bargained right constitutes "concerted" activity, regardless of whether employee turns out to have been correct. *Id.* It is well established that concerted activities includes those relating to wages, safety concerns and other terms and conditions of employment. Whether any particular conduct constitutes concerted activity is a question for the Board's specialized expertise and courts defer to the reasonable discretion of the Board on this issue. *See* discussion, *infra.*

The activities of the Plaintiffs in this case forming the basis of their WPA claims constitute concerted activity. Plaintiffs acted as a group to further group interests, *e.g.* for

"mutual aid and protection." They took action, complained to and/or participated in a Department of Labor investigation regarding matters of wages, safety concerns and perceived violations of a collective bargaining agreement – all traditional subjects of NLRA-protected concerted activity. By claiming that defendants discriminated or retaliated against them for activities constituting concerted activity, Plaintiffs' WPA claims state an unfair labor practice going to the heart of the NLRA and the jurisdiction of the NLRB and are within the exclusive jurisdiction of the NLRB and preempted under Garmon.

The Supreme Court has recognized a narrow exception to preemption where regulated activity is "a merely peripheral concern" of the NLRA or the regulated conduct "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Garmon, 359 U.S. at 243-244. The Supreme Court has held certain narrow categories of state law claims to fall under these exceptions, *i.e.,* obstruction of access to property,[1] threats of physical violence and/or damage to property,[2] malicious libel,[3] intentional infliction of emotional distress,[4] trespass,[5] fraud and breach of contract.[6]

The United States Supreme Court has never found an exception for a state whistleblower-type claim such as Plaintiffs' WPA claims. The Supreme Court has recognized exceptions only in narrow and carefully tailored categories, based on specific prior rulings and criteria that do not

---

[1] United Const. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Const. Corp., 347 U.S. 656 (1954)

[2] Automobile Workers v. Russell, 356 U.S. 634 (1958)

[3] Linn v. Plant Guard Workers, 383 U.S. 53 (1966)

[4] Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290 (1977)

[5] Sears, Roebuck & Company v. Carpenters, 436 U.S. 180 (1978)

[6] Belknap, Inc. v. Hale, 463 U.S. 491, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983)

apply here. Michigan courts are required to follow prevailing opinions of the United States Supreme Court on this issue. *See, e.g.,* Betty v. Brooks & Perkins, 446 Mich. 270, 276, 521 N.W.2d 518 (1994).

The activities underlying Plaintiffs' WPA claims clearly are not a "peripheral concern" of the NLRA. Plaintiffs' WPA claims – alleging wrongful termination of employment for engaging in conduct that would constitute concerted activities under the NLRA – are the very definition of an unfair labor practice. Furthermore, the very relationships (employer/employee), wrongs (retaliatory termination) and remedies (for loss of employment) addressed by the WPA are addressed by the NLRB under the NLRA. Plaintiffs' WPA claims are thus an alternative forum for bringing essentially the same claims Plaintiffs' could have brought before the NLRB. The "peripheral concern" exception does not apply under such circumstances. *See* discussion, *infra.*

Similarly, the WPA does not meet the exception to Garmon for state laws touching on certain "deeply rooted" state interests. For example, the WPA (enacted in 1980) is a relatively recent law *vis-à-vis* the NLRA. Most state laws excepted by the Supreme Court from preemption under this rule were "historic" or "deeply rooted" insofar as they were of the type in place prior to the enactment of the NLRA.

Furthermore, Supreme Court decisions have permitted exceptions to Garmon preemption only in narrow circumstances. When these decisions and the criteria therein are applied to Plaintiffs' WPA claims in the present case, it is clear that they do *not* fall under an exception. As discussed in detail herein, the Supreme Court has found an exception satisfied only in cases where some combination of the following factors were present:

1. Where the primary concern or focus of the state law is not a significant concern or focus of the NLRB or NLRA, *e.g.,* Laburnum (obstruction of access to property), Russell (threats of violence and damage to property), Linn (malicious defamatory

statements), Farmer (severe emotional distress caused by outrageous conduct), Sears (trespass), Belknap (fraud and breach of contract);

2. Where the primary harm or injury remedied by the state law cannot be remedied by the NLRB, *e.g.,* Laburnum (business losses), Russell (physical harm and damage to property), Linn (damage to reputation), Farmer (severe emotional distress), Sears (trespass), Belknap (fraud and breach of contract); and/or

3. Where the state law falls in one of the narrow categories of "historic" state laws or interests that the Court has determined Congress specifically *intended* to remain within the power of states to enforce when it enacted the NLRA, *i.e.* those that address physical violence and threats of violence, mass picketing obstructing access to property, public safety and order and use of the highways and streets. *See* Laburnum, Russell and discussion, *infra.*

None of these three factors is present here. The primary concern and focus of the WPA (retaliatory discharge of employment) likewise is a primary concern and focus of the NLRA and NLRB. The NLRB has specific statutory powers (*e.g.* awarding reinstatement of employment and backpay) to remedy the same primary harm remedied by the WPA (loss of employment). And the WPA clearly does not involve any of the historic state laws or interests the Supreme Court has held may survive preemption. *See* discussion, *infra.*

Summary of LMRDA Preemption Argument

Conflict preemption exists where a state law is in direct conflict with the purposes and objectives of Congress. *Id.* Conflict preemption may exist where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Detroit v. Ambassador Bridge Co., 481 Mich. 29, 35, 748 N.W.2d 221 (2008). When a question of whether a federal statute preempts a state law claim is involved, Michigan Courts are required to follow prevailing opinions of the United States Supreme Court. Betty v. Brooks & Perkins, 446 Mich. 270, 276, 521 N.W.2d 518 (1994).

In Finnegan v. Leu, 456 U.S. 431 (1982), the United States Supreme Court held that the primary purpose of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §

401 *et seq.* ("LMRDA") is to ensure union democracy. The Finngegan Court held that the LMRDA's "overriding objective" is to "ensure that unions would be democratically governed" and "responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. The Finnegan Court held that the "the ability of an elected union president to select his own administrators is an integral part of ensuring" this objective. *Id.* (emphasis added).

The Michigan Court of Appeals in Packowski v United Food and Commercial Workers Local 951, 289 Mich. App. 132, 796 N.W.2d 94 (2010) and courts from other jurisdictions, relying on Finnegan, therefore have correctly held that the LMRDA preempts state-law wrongful-discharge claims by policymaking and policy-implementing employees of a union, because such claims would interfere with the ability of union leaders to implement the policies upon which the members elected the leader. *Id.* at 148.

Here, as in Packowski, to allow Plaintiffs' WPA claims to proceed would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the LMRDA. State law WPA claims by policymaking and/or policy-implementing union employees are conflict-preempted because such claims, just like a wrongful discharge claims by such individuals, would interfere with the ability of union leaders to implement the policies upon which the members elected the leader. *See* Packowski, 289 Mich App at 136.

The similarities between the present case and Packowski (and cases expressly adopted therein) are striking. The Packowski plaintiff, like Plaintiffs herein, was a union "business agent" who claimed that he was wrongfully demoted because he assisted in a federal Department of Labor investigation into the activities of the defendant union and its officers. *See* Packowski, 289 Mich App at 134. Furthermore, here, as in Packowski, none of the Plaintiffs' claims at issue

are premised on the contention that he was fired for refusing to engage or aid in the violation of a criminal statute.

Moreover, opinions from other states adopted in Packowski correctly indicate and/or hold that this preemption doctrine is not limited to "just cause" or contractual wrongful discharge claims, but apply to wrongful discharge and related torts. For example, Dzwonar v. McDevitt, 791 A.2d 1020 (NJ 2002), expressly adopted in Packowski, applied the preemption doctrine to claims premised upon a state "anti-retaliation" statute like the WPA. The Court of Appeals in the present matter should have applied its prior ruling, reasoning and cases adopted in Packowski to hold that Plaintiffs' WPA claims are preempted.

Although the trial court referenced an LMRDA "savings clause" in holding Plaintiffs' WPA claims not preempted, scrutiny of the LMRDA's three savings clauses reveal that they do not cover Plaintiffs' WPA claims. *See* 29 U.S.C. §§ 413, 523, and 524. Sections 413 and 523(a) save state laws and causes of action that benefit union *members*, while Section 524 permits *states* to enact and enforce *general criminal laws*. Application of the express language of the savings clauses, guided by the Supreme Court's rulings in Finnegan, establishes that Plaintiffs' state law civil WPA claims, brought to redress rights as union *employees*, do not fall under the statutory language. *See* discussion, *infra.*

Moreover, to except Plaintiffs' WPA claims from LMRDA preemption would interfere with federal labor policy. The LMRDA establishes a federal scheme that protects the rights of union members through a careful balancing of various rights and remedies. Under this scheme, as held by Finnegan, union *members* have certain protected rights and the right not to be "disciplined" with regard their union *membership* for exercising such rights. Finnegan, at 1871. Under the same scheme, however, in order to protect the rights of union democracy, a Union

manager has the ability "to choose a staff whose views are compatible with his own." Finnegan, 456 U.S. at 441. To accomplish its purposes, the LMRDA permits union members to bring certain causes of action for a violation of his or her *membership* rights established thereunder, but does not permit a cause of action for loss of Union employment by a business agent when terminated by an elected union officer. *Id.* To allow Plaintiffs' state law WPA claim to proceed here – especially where not expressly permitted under the LMRDA's savings clauses – would create undue risk of interfering with this scheme.

Lastly, the federal interest in the activities giving rise to Plaintiffs' WPA claims here is especially strong, and the state interest relatively weak, because the activities giving rise to such claims involve matters traditionally subject to federal labor law (*e.g.* NLRA-protected concerted activity, alleged violations of a collective bargaining agreement) and an alleged violation of the federal LMRDA. As such, there is no basis to conclude that Plaintiffs' WPA claims and/or the activities supporting them are a minor or "peripheral" concern of federal labor law as a way to avoid preemption.

STATEMENT OF FACTS

Defendant Ruedisueli joins in and incorporates herein the statement of facts contained in the appeal brief filed by Appellants Aaron and the Union. Ruedisueli adds and/or highlights that, during the time period relevant to this action, Ruedisueli was the President of the Defendant/Appellant Union while Defendant/Appellant Aaron was the Union's Business Manager. In the trial court, Ruedisueli filed a Concurrence and Joinder in the Motions for Summary Disposition filed by Aaron and the Union in both case numbers. The arguments and relief requested in Appellants' appeal apply equally to Ruedisueli as they do Appellants because Plaintiffs' claims against Ruedisueli under the Whistleblower Protection Act, M.C.L. 15.361, *et seq.* ("WPA") are premised upon the same underlying factual allegations as Plaintiffs' WPA claims against Aaron and the Union.

ARGUMENT

I. STANDARD OF REVIEW

This is an appeal of the Michigan Court' of Appeals' decision affirming the trial court's denial of a motion for summary disposition pursuant to MCR 2.116(C)(4) based on preemption by federal labor law. Federal preemption goes to the issue of subject matter jurisdiction. Ryan v. Brunswick Corp., 454 Mich. 20, 27, 557 N.W.2d 541 (1997), *overruled in part on other grounds by* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002). Federal preemption of state law is an issue of law reviewed *de novo* by this Court. Detroit v. Ambassador Bridge Co., 481 Mich. 29, 35, 748 N.W.2d 221 (2008). Similarly, the grant or denial of a motion for summary disposition is reviewed *de novo*. Groncki v. Detroit Edison Co., 453 Mich. 644, 649, 557 N.W.2d 289 (1996). Issues of subject matter jurisdiction likewise are reviewed *de novo*. Travelers Ins. Co. v. Detroit Edison Co., 465 Mich. 185, 205, 631 N.W.2d 733, 745 (2001).

The issue of whether a state law claim is preempted by a federal statute is a question of federal law and Michigan courts are "bound to follow the prevailing opinions of the United States Supreme Court" when deciding the issue. Betty v. Brooks & Perkins, 446 Mich. 270, 276, 521 N.W.2d 518, 521 (1994), *citing* Allis–Chalmers Corp v. Lueck, 471 U.S. 202, 214 (1985).

II. PLAINTIFFS' WPA CLAIMS ARE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT UNDER THE GARMON DOCTRINE

The National Labor Relations Board ("NLRB" or the "Board") has the singular power to resolve disputes arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 *et seq.* Plaintiffs' claims of retaliatory discharge under Michigan's Whistleblower Protection Act, MCL 15.361, *et seq.* ("WPA") are preempted by federal law because they are based on conduct subject to the exclusive jurisdiction of the NLRB under doctrine announced by the United States Supreme Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

A. The Garmon doctrine requires broad preemption of state law claims premised on conduct that "arguably" is protected or prohibited under the NLRA

In Garmon, the Supreme Court held that when an activity is protected under § 7 of the NLRA or prohibited under § 8 of the NLRA, or even "*arguably*" so protected or prohibited, both the States and the federal courts "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Garmon, 359 U.S. at 245. *See, also,* Bullock v. Auto. Club of Michigan, 432 Mich. 472, 493-495, 444 N.W.2d 114, 124 (1989) (discussing Garmon).

The Garmon Court held that even if the NLRB declines to assume jurisdiction over a matter, the States are not "free to regulate activities they would otherwise be precluded from regulating," because "to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Garmon,

359 U.S. at 246. "The Garmon rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc., 475 U.S. 282, 286 (1986) (emphasis added). The Garmon Court "recognized that Congress, in enacting comprehensive legislation governing labor relations in enterprises affecting commerce and in creating a centralized administrative body charged with administering that legislation, intended to exclude the states from enforcing conflicting laws and procedures and intended to oust both state and Federal courts from the administration of Federal labor laws." Bescoe v. Laborers' Union No. 334, 98 Mich. App. 389, 395, 295 N.W.2d 892, 894 (1980), *citing* Garmon. *See, also,* Calabrese v. Tendercare of Michigan Inc., 262 Mich. App. 256, 262, 685 N.W.2d 313, 317 (2004) (holding state law claims for wrongful discharge and tortious interference based on unionizing activities preempted under Garmon).

The Michigan Court of Appeals has correctly recognized that Garmon established a "broad" rule of preemption – as Garmon makes clear that conduct need only "arguably" by subject to the jurisdiction of the NRLB for related state law claims to be preempted. Bescoe, 98 Mich. App. At 395; 295 N.W.2d at 894 ("After experience had shown that previous efforts to delineate the scope of the preemption doctrine had been unsatisfactory, the Court in Garmon established the broad rule of preemption that still pertains today . . . . Furthermore, the Court made it clear that preemption was to apply even when the conduct which was subject to regulation was only "arguably" under sections 7 and 8 of the act").

Garmon's requirement that conduct only "arguably" be protected or prohibited under the NLRA means that "the party claiming pre-emption is required to demonstrate that his case is one

that the Board could legally decide in his favor." Stated otherwise, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board. The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 395 (1986) (citations omitted). "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 202 (1978).

B. The NLRA protects the right to engage in concerted activities and prohibits employers from interfering with or retaliating against the exercise of that right

The NLRA protects certain activities by employees in § 7 and prohibits certain activities by employers in § 8. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

29 U.S.C. § 157.

Section 8, which characterizes violations by employers of the rights set forth in Section 7 as "unfair labor practices," states in pertinent part:

> (a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. § 158(a)(1).

As discussed herein, the alleged circumstances giving rise to Plaintiffs' state-law WPA claims could have been presented to the NLRB as an unfair labor practice prohibited under Section 8, quoted above. Plaintiff's claims are Garmon preempted and no exception applies.

C. Plaintiffs allege they were terminated for engaging in NLRA-protected concerted activity

Section 7 of the NLRA protects workers' rights to engage in "concerted activity," while Section 8 makes it an unfair labor practice for an employer to violate the rights outlined in § 7. 29 U.S.C. §§ 157, 158(a). It is therefore an unfair labor practice under § 8 for an employer to, *inter alia*, discharge or otherwise discriminate against an employee for engaging in concerted activity. *See, e.g.*, N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 830 (1984) (upholding enforcement of NLRB's order finding employer committed unfair labor practice by discharging employee for engaging in concerted activity – refusing to drive a truck he asserted was unsafe).

NLRA- protected "concerted activity" includes a broad range of conduct which clearly includes the activities of the Plaintiffs in this matter.

Concerted activity, as defined by Section 7, requires "that an employee's action be taken for purposes of collective bargaining or *other mutual aid or protection.*" *Id.* (emphasis added, internal quotation marks omitted). "The term 'concerted activit[y]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *Id.* at 830. Whether particular conduct constitutes "concerted activit[y]," as that term is used in § 7 is a question for the Board's specialized expertise and Courts review a finding of "concerted activity" by the Board only for "reasonableness." *See, id,* 829-30 & n. 7.

The NLRB has held that: "Joining in the 'presentment of grievances by a group of employees to their employer constitutes a concerted activity which [S]ection 7 of the Act was

designed to protect.'" Igramo Enterprise, Inc., 351 NLRB 1337, 1339 (2007), *quoting* NLRB v. Sequoyah Mills, Inc., 409 F.2d 606 (10th Cir. 1969); see Bethlehem Temple Learning Center, 330 NLRB 1177, 1177-1178 (2000) (employee joint complaints to management and discussions about noncompete agreement protected); Liberty Natural Products, 314 NLRB 630 (1994), enfd. 73 F.3d 369 (9th Cir. 1995) (signing petition constitutes protected concerted activity).

The phrase "concerted activities," however, does not refer *only* to situations where two or more employees work together at the same time and place toward a common goal. City Disposal Sys., Inc., 465 U.S. at 830. "[A]n individual employee may be engaged in concerted activity when he acts alone." *Id.* at 831. It is well-recognized that an individual employee may be engaged in concerted activity when he acts alone in several other situations: where the lone employee intends to induce group activity, or where the employee acts as a representative of at least one other employee. *Id.*, *citing* e.g., Aro, Inc. v. NLRB, 596 F.2d 713, 717 (6th Cir.1979). "[T]he relevant question is whether the employee acted with the purpose of furthering group goals." Compuware Corp. v. N.L.R.B., 134 F.3d 1285, 1288 (6th Cir. 1998).

Thus, if the interest being furthered by the activity is a group interest, rather than an individual interest, it is concerted. This Court has observed, in the context of the protection of "concerted activity" under Michigan's Public Employment Relations Act, M.C.L. § 423.201 *et seq.* ("PERA"), that:

> Activities furthering a group rather than an individual interest will generally be considered concerted.

Michigan Employment Relations Comm'n v. Reeths-Puffer Sch. Dist., 391 Mich. 253, 275, 215 N.W.2d 672, 682 (1974), *citing* N.L.R.B. v. Phoenix Mut. Life Ins. Co., 167 F.2d 983 (7th Cir. 1948); Salt River Valley Water Users' Ass'n v. N.L.R.B., 206 F.2d 325 (9th Cir. 1953); 6 A.L.R.2d 416.

Conduct may constitute protected "concerted activity" even if the employees are not union members or if disputes do not arise from organized activity. *See, e.g.,* Smith v. Excel Maint. Services, Inc., 617 F. Supp. 2d 520, 526-27 (W.D. Ky. 2008) ("*Garmon* preemption does not apply only to disputes arising from organized union activity. Instead, 'concerted activities' concerning 'conditions of employment' by wholly unorganized employees may be protected under § 7"). Similarly, "concerted activity" need not expressly refer to a collective bargaining agreement. City Disposal Sys. Inc., 465 U.S. 822, 839-40 (1984). "As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement" such that his action is "concerted" within meaning of the NLRA. *Id.* at 840. An honest invocation of collectively bargained right constitutes "concerted" activity, regardless of whether employee turns out to have been correct in his belief that his right was violated. *Id.*

Here, the relevant activities of the Plaintiffs both were carried out as a group and related to matters affecting a group of employees (*i.e.* for "mutual aid and protection") and premised upon their beliefs that the conduct complained of violated a collective bargaining agreement. Plaintiffs' complaints and activities at issue clearly were "concerted activity."

Plaintiffs' depositions in the present matter confirm their concerns were premised upon their belief of a violation of a collective bargaining agreement. Protected concerted activity under § 7 includes "a reasonably perceived violation of the collective-bargaining agreement." City Disposal, 65 U.S. at 841.

Furthermore, the specific subjects of Plaintiffs' concerns (wages and safety issues) are traditional subjects of protected concerted activity. Such concerns go to the heart of the terms

and conditions of employment falling under Section 7. *See, e.g.,* N.L.R.B. v. Main St. Terrace Care Ctr., 218 F.3d 531, 539-40 (6th Cir. 2000) ("protests of wages, hours, and working conditions, as well as the presentation of job-related grievances are activities protected by § 7"). Gatliff Coal Co. v. NLRB, 953 F.2d 247, 251 (6th Cir.1992) ("Concerted employee activities are protected by § 7 where the activities can reasonably be seen as affecting the terms or conditions of employment"). The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." Triana Industries, 245 N.L.R.B. 1258, 1258 (1979). The Board has, in fact, termed wages as probably the most critical element in employment and "the grist on which concerted activity feeds." Aroostook County Regional Ophthalmology Center, 317 N.L.R.B. 218, 220 (1995); N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 824-26 (1984) (truck driver's assertion of right to be free of obligation to drive unsafe trucks is concerted activity under Section 7). Platt v. Jack Cooper Transp., Co., Inc., 959 F.2d 91, 94 (8th Cir. 1992), *citing* City Disposal, 465 U.S. at 841 & Meyers Ind., Inc., 268 N.L.R.B. 493, 123 L.R.R.M. 1137 (1986).[6] ("[Plaintiff]'s claim that he was discharged in retaliation for making safety complaints satisfies the threshold test for *Garmon* preemption").

Plaintiffs engaged in a number of meetings and activities relating to their concerns, which included complaint and/or meetings with the state and/or federal Department of Labor. "[I]ndividual employee action may also constitute concerted activity if it represents either a 'continuation' of earlier concerted activities or a 'logical outgrowth' of concerted activity." Mobil Exploration & Producing U.S., Inc. v. N.L.R.B., 200 F.3d 230, 238 (5th Cir. 1999), *citing* Burle Indus., Inc., 300 N.L.R.B. 498 (1990), *enforced without op.*, 932 F.2d 958 (3d Cir.1991); Jhirmack Enterprises v. Allison, 283 N.L.R.B. 609 (1987); Rogers Envtl. Contracting, 325

N.L.R.B. No. 8, (1997); Every Woman's Place, Inc., 282 N.L.R.B. 413 (1986), *enforced*, 833 F.2d 1012, 1987 WL 39055 (6th Cir.1987).

The proper characterization of Plaintiffs' conduct as protected concerted activities is not altered by the fact that they filed a complaint with the state or federal Department of Labor regarding their concerns or participated in an investigation by representatives thereof. Employees do not lose their protection under Section 7's "mutual aid or protection" clause when they resort to channels "outside the immediate employee-employer relationship." Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978). The "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through "resort to administrative and judicial forums." *Id.* at 565-66.

Plaintiffs claim they were terminated from their employment in retaliation for engaging in conduct constituting protected concerted activity under Section 7 of the NLRA. Such a claim goes to the heart of the NLRA and the jurisdiction of the NLRB. It is therefore within the exclusive jurisdiction of the NLRB and preempted under Garmon.

D. The "peripheral concern" and "deeply rooted in local feeling and responsibility" exceptions to Garmon preemption

Garmon held that some controversies arguably subject to § 7 or § 8 are not pre-empted in limited circumstances:

> [D]ue regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Garmon, 359 U.S., at 243-244 (emphasis added, citations omitted); Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 392 (1986).

This Court's Order granting leave requested that the parties address the issue of whether the above-described exceptions apply in this case. For reasons below, the exceptions do not apply to WPA claims or Plaintiffs' claims in the present matter.

As detailed below, none of the factors that have caused the Supreme Court to except certain state law claims from Garmon preemption exist here. Here, unlike those situations where the Court has found an exception satisfied: (a) the same conduct that gives rise to Plaintiffs' WPA claims could support an unfair labor practice charge; (b) the WPA governs the same types of relationships and claims as does the NLRA (employer/employee relationships and certain claims for illegal retaliation); (c) the primary harm remedied by the WPA (loss of employment) may be remedied by the NLRA (backpay and reinstatement of employment); and (d) the WPA does not have the same "historic" concern to the state or fall into one of the categories as those limited state law claims which have been held by the Supreme Court to fall under an exception.

E. The "peripheral concern" and "local interest" exceptions are narrowly construed

The U.S. Supreme Court has established certain narrow categories of state law claims that fall under the "peripheral concern" and/or "local interest" exceptions to Garmon preemption, *i.e.* obstruction of access to property,[7] threats of physical violence and/or damage to property,[8] malicious libel,[9] intentional infliction of emotional distress,[10] trespass,[11] fraud and breach of

[7] United Const. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Const. Corp., 347 U.S. 656 (1954)

[8] Automobile Workers v. Russell, 356 U.S. 634 (1958)

[9] Linn v. Plant Guard Workers, 383 U.S. 53 (1966)

[10] Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290 (1977)

[11] Sears, Roebuck & Company v. Carpenters, 436 U.S. 180 (1978)

contract.[12] The Michigan Court of Appeals has correctly recognized that the exceptions to Garmon preemption have been *construed narrowly*, in favor of the broad, exclusive jurisdiction of the NLRB. Pierson v Ahern, 260661, 2005 WL 1685103 (Mich. Ct. App. July 19, 2005) (attached hereto as Exhibit A), *citing* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391-393; 106 S Ct 1904; 90 L.Ed.2d 389 (1986). *See, also,* Bescoe v. Laborers' Union No. 334, 98 Mich. App. 389, 395, 295 N.W.2d 892, 894 (1980) (likewise recognizing the "broad" nature of Garmon preemption).

The Supreme Court has emphasized that an exception to Garmon preemption may be recognized only in "comparable circumstances" as those cases where it previously has found exceptions to exist. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 221 (1978) ("Our decisions leave no doubt that exceptions to the *Garmon* principle are to be recognized only in comparable circumstances [established in our prior decisions]").

In recognition of the narrow scope of permitted exceptions, the Supreme Court has, in a number of cases, *limited* an exception to specific sub-categories of a state law claim in order to avoid "interference" with the "federal scheme." *See, e.g.,* Linn v. Plant Guard Workers, 383 U.S. 53, 65-66 (1966) (limiting exception for libel claims to those involving both malicious libel and actual damages), Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 305 (1977) (limiting exception for intentional infliction of emotional distress to torts that are either unrelated to employment discrimination or a function of the "particularly abusive manner in which the discrimination is accomplished or threatened" rather than a function of the discrimination itself) and discussion, *infra.*

F. Plaintiff's WPA claims are not a "peripheral concern" of the NLRA

[12]Belknap, Inc. v. Hale, 463 U.S. 491, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983)

At the core of Plaintiffs' WPA claims is their allegation of retaliation (discharge from employment) for their participation in conduct constituting protected concerted activity – the very subject matter of the NLRA. Thus, the *same* activities and evidence supporting Plaintiffs' WPA claims also could support an unfair labor practice claim under the NLRA. Furthermore, Plaintiffs' Complaints in both trial court case numbers expressly seek job reinstatement and compensatory damages for their loss of employment, *i.e.* relief that could be awarded by the NLRB. *See* discussion, *infra.* Plaintiffs' state law WPA claims thus are an alternative forum for obtaining relief that the NLRB could provide. As such, the activities supporting Plaintiffs' WPA claims are *not* a "peripheral concern" of the NLRA. *See, e.g.,* Kilb v. First Student Transp., LLC, 157 Wash. App. 280, 291, 236 P.3d 968, 974 (2010) ("Here, Kilb's allegations are the very definition of unfair labor practices regulated under the Act. We cannot construe his claim as a peripheral matter that bars preemption"). Platt v. Jack Cooper Transp., Co., Inc., 959 F.2d 91, 95 (8th Cir. 1992) ("Platt could have brought to the NLRB the specific claim asserted in this lawsuit-that he was fired for making job safety complaints. Moreover, from a remedial standpoint, Platt's lawsuit seeks reinstatement and back pay, so that the court is simply "an alternative forum for obtaining relief that the Board can provide. Thus, both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized") (*citing* Belknap, Inc. v. Hale, 463 U.S. 491, 510 (1983)). *See, also,* discussion, *infra.*

G. The WPA is not "deeply rooted" or of "historic significance" within the meaning of the Garmon doctrine

The "deeply rooted" and/or "historically significant" state law actions which the Supreme Court has determined to be excepted from Garmon preemption are limited to specific categories state laws or concerns. As discussed further, *infra*, the Court has recognized a "historic state

interest in 'such traditionally local matters as public safety and order and the use of streets and highways" and state actions to address "injuries caused by violence or threats of violence." Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 299-300 (1977), *citing* Allen-Bradley Local v. Wisconsin Emp. Rel. Bd., 315 U.S. 740, 749 (1942) (emphasis added).

The WPA clearly does not fall under any of the categories of excepted "historic" state laws recognized by the Supreme Court. Moreover, the WPA is not "historic" in time, when compared to the recognized "historic" state law exceptions. The WPA was enacted in 1980 and became effective in 1981. See MCL 15.361, *et seq.*; P.A.1980, NO. 469, Eff. March 31. 1981. This is long after the enactment of the NLRA or the Supreme Court's decision in Garmon.

Furthermore, the state does not have a compelling state interest in enforcing the WPA in the context of the present matter because the specific concerns of the WPA are addressed by the NLRA and the NLRB. The WPA governs relationships between employers and employees -- like the NLRA. The WPA states in this regard that:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [M.C.L. 15.362]

To establish a prima facie WPA case, it must be established that: "(1) the plaintiff was engaged in protected activity as defined by the Whistleblowers' Protection Act, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the

discharge." Shallal v. Catholic Soc. Services of Wayne County, 455 Mich. 604, 610, 566 N.W.2d 571, 574 (1997).

The remedies available under the WPA address the same primary loss that may be remedied by the NLRB, *i.e.* loss of employment. The WPA permits a plaintiff to file a "civil action for appropriate injunctive relief, or actual damages." MCL 16.363(1). The remedies provided under the WPA include reinstatement of employment, payment of back pay and reinstatement of fringe benefits, and attorney fees if the Court deems them appropriate. MCL 15.364.[13]

The NRLA permits the Board to award similar damages to those available under the WPA. This includes injunctive relief as necessary to restrain unfair labor practices, and reinstatement and backpay for an employee who has been discriminated against in violation of the statute, as well as backpay. 29 U.S.C. § 160(c). The Board has "broad" remedial powers to make employees "whole for losses suffered on account of an unfair labor practice." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941). Back pay is just one of the authorized remedies utilized to attain this end. N.L.R.B. v. Strong, 393 U.S. 357, 359 (1969). *See, also,* N.L.R.B. v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-63 (1969) (noting the broad remedial power of the NLRB to take action such as reinstatement of employees, with or without backpay,

[13]Although the WPA permits an award of attorney and witness fees to a prevailing complainant; a person alleging an unfair labor practice charge before the NLRB need not retain his or her own counsel. Once a complainant files a charge with a Regional Office of the NLRB's General Counsel, an investigation is conducted by representative of that office and, if a complaint is issued, the Office of General Counsel advocates the complaint before the Board. *See, e.g.,* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-42 (1975) (general description of NLRB's administrative process upon receipt of an unfair labor practice charge); http://www.nlrb.gov/what-we-do/investigate-charges (NLRB webpage describing its general procedures).

and otherwise to effectuate the policies of the NLRA); N.L.R.B. v. Jackson Hosp. Corp., 557 F.3d 301, 306 (6th Cir. 2009).

Thus, the WPA is an alternative forum for obtaining relief the NLRB can provide. As the 8th Circuit concluded in finding a whistblower-type statute *not* excepted from Garmon preemption, this is not the type of case in which a local interest exception has been recognized.

> [F]rom a remedial standpoint, Platt's lawsuit seeks reinstatement and back pay, so that the court is simply "an alternative forum for obtaining relief that the Board can provide." *Belknap, Inc. v. Hale,* 463 U.S. 491, 510, 103 S.Ct. 3172, 3183, 77 L.Ed.2d 798 (1983). Thus, both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized. *See, e.g., Linn,* 383 U.S. at 63-64, 86 S.Ct. at 663-64.

Platt v. Jack Cooper Transp., Co., Inc., 959 F.2d 91, 95 (8th Cir. 1992).

H. Application of U.S. Supreme Court decisions finding the peripheral interest or local concern exception satisfied demonstrates that neither exception applies in the present matter

The "considerations that underlie the Garmon rule have led the [Supreme] Court to recognize exceptions in appropriate classes of cases." Farmer v. United Broth. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 297 (1977). Michigan courts are bound to follow prevailing opinions of the U.S. Supreme Court when deciding issues of federal preemption. Betty v. Brooks & Perkins, 446 Mich. 270, 276, 521 N.W.2d 518, 521 (1994).

A close review of relevant Supreme Court decisions reveals that only certain narrowly tailored categories of historic state laws and state laws addressing certain specific state interests meet the exception. When these decisions are carefully scrutinized, it is clear that the WPA, though important, is not a law that "touche[s] interests so deeply rooted in local feeling and responsibility" that it cannot be inferred that Congress "deprived the States of the power to act" when it enacted the NLRA and created the NLRB and its procedures.

i. Laburnum & Russell – physical violence & threats of violence

Two Supreme Court decisions issued prior to Garmon, United Const. Workers, Affiliated with United Mine Workers of Am. v. Laburnum Const. Corp., 347 U.S. 656 (1954) and Automobile Workers v. Russell, 356 U.S. 634 (1958), held that state law actions against unions for threats of physical violence and/or harm to property, in the context of union activities, were not within the exclusive jurisdiction of the NLRB – even though such conduct also constituted unfair labor practices under the NLRA.

Laburnum involved a tort action by a construction contracting company against a labor union for damage resulting when union's agents so threatened and intimidated the contractor's officers and employees that the contractor was unable to continue with construction projects. *Id.* The union's agents had "threatened and intimidated [the company's] officers and employees with violence to such a degree that [the company] was compelled to abandon and its projects in that area" and as a result, the company was "deprived of substantial profits it otherwise would have earned on those and other projects." A jury found defendants liable to the plaintiff for both compensatory and punitive damages as permitted under state law. *Id.* at 658. The Court held that the NRLB did not have exclusive jurisdiction over claims related to the conduct at issue because to do so would "deprive" the plaintiff "of its property without recourse or compensation: and in effect, grant the union defendants "immunity from liability for their tortious conduct." *Id.* at 664. Notably, the damages awarded to the plaintiff in the state court action were for business losses and punitive damages – which the Court the NLRB could not have awarded because its compensatory remedies consisted primarily of "reinstatement of wrongfully discharged employees with back pay." *Id.* at 665.

Laburdum also relied upon prior Supreme Court precedent holding that "the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.'" *Id.* at 664, *quoting* Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740, 749 (1942).

The Laburnum Court placed significant weight on legislative history indicating that Congress specifically *intended* that states retain authority over the specific matters of mass picketing, physical violence and threats of violence in the context of union organizing campaigns – even if such actions also constitute an unfair labor practice under the jurisdiction of the NLRB. The Court observed:

> The history of the enactment of s 8(b)(1)(A) lends further support to this interpretation. Senate Report No. 105, 80th Cong., 1st Sess. 50, as to S. 1126, said in part:
>
> '. . . The committee heard many instances of union coercion of employees such as that brought about by threats of reprisal against employees and their families in the course of organizing campaigns; also direct interference by mass picketing and other violence. Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board, and at least deprive the violators of any protection furnished by the Wagner Act.' (Emphasis added.)
>
> Senator Taft, one of the sponsors of the bill, added later:
>
> 'But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the State. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence, as employers once did, if they use the kind of goonsquad tactics labor unions are permitted to use-and they once did-if they threaten men with physical violence if they join a union, they are subject to State law, and they are also subject to be proceeded against for violating the National Labor Relations Act. There is no reason in the world why there should not be two remedies for an act of that kind.' (Emphasis added.) 93 Cong.Rec. 4024.

Id. at 668-669.

Thus, the factors the led the Laburnum Court to find an exception to preemption were the combination of: (1) the NLRB had no power to remedy the primary harms suffered by the plaintiff and permitted by the state law at issue; (2) prior Supreme Court precedent holding that a state's "historic powers" in "public safety" and "order and the use of streets and highways" remained with the state despite the NLRA; and (3) specific legislative history congress intended for states to retain the authority to address violence, threats of violence in the course of union organizing campaigns, and interference by mass picketing.

In Automobile Workers v. Russell, 356 U.S. 634 (1958), the Court found an exception to NLRA preemption for a state law claim of malicious interference with the plaintiff employee's occupation during the course of union activities. *Id.* at 635. The state law cause of action was premised on plaintiff's claim that the defendant union, through mass picketing and threats of physical violence to the plaintiff and damage to his property, maliciously and willfully prevented him from entering his workplace and engaging in his employment over a period of multiple days. *Id.* at 638-639. A primary concern of the Court in Russell in finding an exemption from preemption in that case was that the remedies that would be available to the plaintiff under his state law tort claims (reimbursement for medical expenses, pain and suffering, and property damages) would not be available from the Board – which would grant a union "substantial immunity" from the consequences of its actions if the Board had exclusive jurisdiction over that claim. The Court noted that, in the state law action, the plaintiff may have been entitled to seek a wide variety of compensatory damages for a physical injury, damage to personal property and medical expenses – which would be outside the Board's authority to order. Russell, 356 U.S. at 645-646 (citations omitted). In finding that such circumstances supported an exception to

preemption for the state law at issue in that case, the Court relied heavily upon its recent decision in Laburnum, *supra.*

Subsequent Supreme Court decisions have cited Laburnum, Russell and Allen-Bradley for the propositions that the federal labor statutes do not protect or immunize from state action the matters of violence or threats of violence in a labor dispute and the "historic state interest" in the traditionally local matters of public safety and order and the use of streets and highways. *See* Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 299-300 (1977) and discussion, *infra.*

In stark contrast to Laburnum and Russell, the *present* case clearly does not involve matters of violence, threats of violence (in or outside of a labor dispute), physical harm, damage to property, damage to business, or the "historic state interest" in the local matters of public safety and order and the use of streets and highways. Furthermore, this is not a case where the primary harm sought to be remedied by Plaintiffs under the state law at issue (loss of employment) is not within the jurisdiction of the NLRB to award. On the contrary, the NLRB has authority to award reinstatement and backpay – which may compensate for the very harm claimed by Plaintiffs.

ii. Linn – malicious libel

In Linn v. Plant Guard Workers, 383 U.S. 53 (1966), the Supreme Court created a limited exception to Garmon preemption for claims for malicious libel which involve actual damages. The plaintiff's lawsuit alleged that the defendants (which included a union and two of its representatives) published defamatory statement about him in violation of state law – which also could have established a violation of Section 8 of the NLRA.

For a number of reasons, the Court found that the exercise of state jurisdiction in that case would be a "peripheral concern" of the NLRA, but only where limited to libel issued with knowledge of falsity or reckless disregard for truth. *Id.* at 61. First, the Court noted that the circulation of defamatory material known to be false was not protected under the NLRA and there was thus no risk that permitting the state cause of action to proceed would result in state regulation of conduct that Congress intended to protect. *Id.* at 61. Second, the Court recognized "an overriding state interest" in protecting residents from malicious libels and concluded that this state interest was "deeply rooted in local feeling and responsibility." *Id.* at 61-62. The Court buttressed this conclusion by reference to prior authority holding that "existing criminal penalties or liabilities for tortious conduct" was not eliminated by the NLRA if there was no conflict with the Act. *Id.* at 61-62, *citing* United Construction Workers Etc. v. Laburnum Construction Corp., 347 U.S. 656, 665 (1954) (emphasis added). Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy, because the Board proceeding would focus only on whether the statements were misleading or coercive and whether there also were defamatory or malicious would be of no relevance. *Id.*, at 63.

Moreover, the Court relied upon the fact that the NLRB had no authority to award the Plaintiff damages for loss of reputation and/or other relief resulting from defamation. *Id.* at 63-64 On the other hand, the state-law libel action would not be concerned with whether the statements were coercive or misleading in the labor context.

Taken together, The Court found these factors justified an exception to the preemption rule. However, the Court went on to further narrow its ruling as to what state law torts would be excepted from preemption.

To minimize the risk of interference with the administration of national labor policy, the court significantly limited the scope of the exception. First, to reduce the possibility that state libel suits would either dampen the free discussion characteristic of labor disputes or become a weapon of economic coercion, the Court adopted the standards enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and held that libel claims would avoid preemption only if limited to defamatory statements published with knowledge or reckless disregard of their falsity. *Id.* at640-65. Second, damages would be recoverable *only* if the defamatory statements caused actual injury (e.g., injury to reputation, mental suffering), *i.e.* that damages could *not* be presumed. Third, the Court stressed the duty of the trial court to require a remittitur or new trial if "excessive" damages are awarded. *Id.* at 65-66.

In contrast to the state law of libel at issue in Linn, state jurisdiction in the present case would not be of a "peripheral concern" of the NLRA. First, WPA, unlike state law claims for libel, are not "deeply rooted" within the meaning of Linn and the Garmon doctrine – as the WPA was first enacted in 1980, well after enactment of the NLRA. Second, and perhaps more importantly, the "focus" of the Board and the remedies it could award in the present matter are not significantly different from those under the state law at issue. The WPA, like the NLRA, regulates relations between employers and employees, prohibits retaliatory actions by employers for specified protected activities, and provides authority remedies for loss of employment. Thus, both "the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized" by the Supreme Court. Platt v. Jack Cooper Transp., Co., Inc., 959 F.2d 91, 95 (8th Cir. 1992) (finding, under very similar circumstances to the present case, a state whistleblower action preempted under Garmon and that the "local concern" exception did not apply). *See,*

also, Dobrski v. Ford Motor Co., 698 F. Supp. 2d 966, 982-983 (N.D. Ohio 2010) (Holding that, where the state law whistleblower claim in that case was identical to that which could have been raised to the NLRB, the NLRB has exclusive jurisdiction over the matter. "[I]f the state law claim is identical to a potential claim to the NLRB, then the NLRB has exclusive jurisdiction 'because the state regulation impinges directly on the Board's prerogative to fashion a uniform labor policy'").

iii. Farmer – intentional infliction of emotional distress

In Farmer v. United Broth. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290 (1977), the Court recognized a limited exception to Garmon preemption for certain state law claims for intentional infliction of emotional distress. The reason the Court found an exception was that no provision of the NLRA protects the "outrageous conduct" complained of by the plaintiff and no protection for union officers' conduct "so outrageous that 'no reasonable man in a civilized society should be expected to endure it." *Id.* at 302. Thus, allowing the claim to proceed did not result in state regulation of federally protected or prohibited conduct. Moreover, the primary damage claim in Farmers was for emotional distress damages, which is not a remedy available from the NLRB. *Id.* at 304.

The Court held that the state has a "substantial interest" in protecting citizens from *emotional distress* caused by *outrageous conduct* – which the Court found to be similar to the physical injury at issue in Russell and damage to reputation at issue in Linn. *Id.* at 302. Although the Court recognized that the tort of IIED is a "comparatively recent development in state law," it reasoned that its decisions permitting state jurisdiction in *tort actions* based on *violence* or *defamation* rested on the "nature of the state's interest in protecting the health and well-being of its citizens." *Id.* at 302-303. Thus, the Court has limited the exception for certain

state law tort actions to those resting on the state interest in protecting health and well-being of its citizens.

Significantly, to minimize the risk of interference with the federal scheme, the Farmer Court was careful to limit the exception to torts that are either unrelated to employment discrimination or a function of the "particularly abusive manner in which the discrimination is accomplished or threatened" rather than a function of the discrimination itself. *Id.* at 305. The Farmer court also warned that the state trial has a responsibility to assure that any damages awarded are not excessive. *Id.* at 306.

Here, in contrast to Farmer, the WPA is not a tort based on the state interest in protecting health and well-being of its citizens.[14]

In further contrast to IIED claims at issue in Farmer, the NLRA does provide protection for the same conduct (alleged retaliatory discharge) and losses (loss of employment) implicated in the Plaintiffs' WPA claims. Thus, to allow the WPA claims to proceed would result in state regulation of federally protected or prohibited conduct. In further contrast to the IIED claims at

---

[14]California courts recognize that when a cause of action for wrongful termination arguably subject to the NLRA does not involve health and safety laws it is Garmon preempted. See Ruscigno v. Am. Nat'l Can Co., Inc., 84 Cal. App. 4th 112, 118, 100 Cal. Rptr. 2d 585, 588 (2000) (preemption of action for wrongful termination in violation of public policy against discrimination based on "being a witness in a legal proceeding or because of testimony offered in a legal proceeding"); Rodriguez v. Yellow Cab Coop., Inc., 206 Cal. App. 3d 668, 253 Cal. Rptr. 779 (Ct. App. 1988) (employee's state law wrongful termination suit alleging that he was fired in retaliation for his testimony before Public Utilities Commission and instigation of class action suit against employer, preempted by NLRA where activities were related to labor-management problems and job security); Kelecheva v. Multivision Cable T.V. Corp., 18 Cal. App. 4th 521, 22 Cal. Rptr. 2d 453 (1993) (tort claim for wrongful termination in violation of public policy, based on employer's alleged discharge of supervisor for failure to engage in antiunion activities, preempted under *Garmon* doctrine); Luke v. Collotype Labels USA, Inc., 159 Cal. App. 4th 1463, 1472, 72 Cal. Rptr. 3d 440, 446 (2008) (recognizing distinction, as to whether Garmon preemption applies, between wrongful discharges that do and do not involve public health and safety).

issue in Farmer, the NLRA and the Board may award remedies that compensate the primary loss at issue in a WPA claim (backpay and/or job reinstatement).

Furthermore, the Farmer Court's limitation of the exception to claims unrelated to employment discrimination is extremely significant here – it means that that state law claims that do involve employment discrimination remain Garmon preempted. WPA claims *necessarily* involve employment discrimination because a plaintiff must show a "causal connection" between protected activity and discharge from employment. *See* Shallal v. Catholic Soc. Services of Wayne County, 455 Mich. 604, 610, 566 N.W.2d 571, 574 (1997).

iv. Sears, Roebuck & Company – trespass

In Sears, Roebuck & Company v. Carpenters, 436 U.S. 180 (1978), the Court held that a state action for trespass was not preempted because it concerned only the location of the picketing while the arguable unfair labor practice would have focused on the object of the picketing. The Court emphasized that the controversy that would be presented to the Board would not be the same as the controversy that would be presented to the state court. *Id.* at 198. In contrast here, the focus of the Board would be the same as the focus of the state court, *i.e.* whether the Plaintiffs' employment was terminated in retaliation for their conduct.

v. Belknap -- fraud and misrepresentation

In Belknap, Inc. v. Hale, 463 U.S. 491 (1983), the Court held that the NLRA did not preempt a state court misrepresentation and breach-of-contract action brought by strike replacements who were displaced by reinstated strikers who had been promised that they would *not* be fired to accommodate returning strikers. The Court held that, although the employer's offer of permanent employment to the replacements arguably was an unfair labor practice subject

to the Board's jurisdiction, the exceptions noted in Garmon permitted the state law claims to nevertheless proceed. *Id.* at 509.

The Belknap Court focused on the fact that, although the issue of whether the strike and the employer's offer of permanent employment to the replacements were unfair labor practices were matters for the Board, "[t]he focus of these determinations . . would be on whether the rights of strikers were being infringed." *Id.* at 510. The NLRB would have no concern or jurisdiction over the question of whether the replacements (the plaintiffs in the state lawsuit) were deceived or had actionable breach of contract actions against the employer. Similarly, the Board would have no authority to award the replacements any relief for the harm at issue in their claims, *i.e.* the Board could not award reinstatement to the replacements or damages for breach of contract. The Court concluded that the state court misrepresentation action would "in no way offer them an alternative forum for obtaining relief that the Board can provide," just as in Linn, Sears and Farmers. *Id.* at 510-511. The Court thus concluded that the state action would not "interfere with the Board's determination of matters within its jurisdiction" and was a mere "peripheral concern" to the Board and federal labor law. *Id.* at 511. The Court emphasized that, as in Linn, it could "award no damages, impose no penalty, or give any other relief" to the plaintiffs in this case. *Id.*, *citing* Linn, *supra* at 63.

With regard to the breach of contract action, the Court concluded that, whether or not the Board ordered the strikers reinstated, the state court could award compensatory relief to the plaintiffs, without interfering with the Board's jurisdiction or an interest of federal labor law. The Court found that the interest of the Board and federal law, in regard to the rights of the strikers, and the interests of the state in providing a remedy to the replacements for breach of contract, were "discrete" concerns. *Id.*

In stark contrast to the state law fraud and breach of contract claims permitted in Belknap, Plaintiff's WPA claims here involve the *same* interests that the Board would address in an unfair labor practice charge (the retaliatory discharge of the Plaintiffs' employment) and the Board *could* compensate for the same primary harm (loss of employment) addressed by the WPA. In the present case, unlike Belknap, both the Board and the state law claim at issue could provide compensation to the same persons – Plaintiffs herein.

II. PLAINTIFFS' WPA CLAIMS ARE PREEMPTED BY THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Federal preemption may be either express or implied. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Ryan v. Brunswick Corp., 454 Mich. 20, 28, 557 N.W.2d 541, 546 (1997), *abrogated in part on other grounds*, Sprietsma v. Mercury Marine, a Div. of Brunswick Corp., 537 U.S. 51 (2002). For preemption to be express, the intent of Congress to preempt must be clearly stated in the statute's language or impliedly contained in the statute's structure and purpose. Cipollone, *supra* at 516.

If preemption is not express, implied preemption may exist as "conflict" preemption or "field" preemption. Field preemption preempts state law where the federal law so thoroughly occupies a legislative field that it is reasonable to infer that Congress did not intend for states to supplement it. Cipollone, *supra* at 516.

Conflict preemption exists to the extent that state law is in direct conflict with federal law or with the purposes and objectives of Congress. *Id.* Stated otherwise, conflict preemption may exist where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Detroit v. Ambassador Bridge Co., 481 Mich. 29, 35, 748 N.W.2d 221 (2008), *citing* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991). Similarly, "[p]reemption can occur when a state law or local regulation prevents a

private entity from carrying out a federal function that Congress has tasked it with performing." Ambassador Bridge Co., 481 Mich. at 36.

When a question of whether a federal statute preempts a state law claim is involved, Michigan Courts are required to follow prevailing opinions of the United States Supreme Court. Allis–Chalmers Corp. v. Lueck, 471 U.S. 202, 214 (1985); Betty v. Brooks & Perkins, 446 Mich. 270, 276, 521 N.W.2d 518 (1994).

In Finnegan v. Leu, 456 U.S. 431 (1982), the United States Supreme Court held that the primary purpose of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA") is to ensure union democracy. The Finngegan Court held that the LMRDA's "overriding objective" is to "ensure that unions would be democratically governed" and "responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. The Finnegan Court held that the "the ability of an elected union president to select his own administrators is an integral part of ensuring" this objective. *Id.* (emphasis added).

Thus, Finnegan holds that the LMRDA protects the ability of elected union officials to select their own administrators without interference. The Michigan Court of Appeals in Packowski v United Food and Commercial Workers Local 951, 289 Mich. App. 132, 796 N.W.2d 94 (2010) and courts from other jurisdictions, relying on Finnegan, therefore have held that the LMRDA preempts state-law wrongful-discharge claims by policymaking and policy-implementing employees of a union, because such claims would interfere with the ability of union leaders to implement the policies upon which the members elected the leader. The Packowski Court succinctly reasoned as follows:

> *Finnegan* was clear that at least one of the purposes of the LMRDA is to promote union democracy and ensure that the representatives whom union members have elected are able to carry out the policies on which they were elected. See *Finnegan,* 456 U.S. at 442, 102 S.Ct. 1867 ("[I]n enacting Title I of the Act,

> Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy . . . ."). Preemption applies when a state-law claim conflicts with the purposes of federal law. *Ambassador Bridge,* 481 Mich. at 36, 748 N.W.2d 221. We believe that, in this case, plaintiff's claim would conflict with the efforts of elected union officials to implement the policies on which they were elected and, in that way, interfere with one of the purposes of the LMRDA.

Id. at 148.

Here, as in Packowski, to allow Plaintiffs' WPA claims to proceed would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the LMRDA. *See* Ambassador Bridge Co., 481 Mich. at 35. Indeed, state law WPA claims by policymaking and/or policy-implementing union employees are conflict-preempted because such claims, just like a wrongful discharge claims by such individuals, would interfere with the ability of union leaders to implement the policies upon which the members elected the leader. *See* Packowski, 289 Mich App at 136. As discussed below, cases from other states expressly adopted in Packowski indicate and/or hold that whistleblower-type claims, as well as wrongful discharge claims, are preempted by the LMRDA.

The similarities between the present cases and Packowski (and cases expressly adopted therein) are striking. The Packowski plaintiff, like the Plaintiffs herein, was a union "business agent" who claimed that he was wrongfully demoted because he assisted in a federal Department of Labor investigation into the activities of the defendant union and its officers. *See* Packowski, 289 Mich App at 134. The Packowski Court held that the plaintiffs' claims were preempted because they interfered with the unrestricted freedom of elected union officials to select or discharge business agents provided under the LMRDA and because none of the claims satisfied an exception to this preemption recognized by some other courts, *i.e.* where a plaintiff claims he or she was fired for refusing to engage or aid in the violation of a criminal statute.

A. LMRDA preemption applies because the Plaintiffs were policy implementing employees of the Union and the employment decisions were made by an elected Union official

The critical question in determining whether Plaintiffs' WPA claims are preempted by the LMRDA is whether they conflict with the LMRDA's policy of permitting elected union officials unrestricted freedom to select business agents of their choosing. Packowski expressly adopted the reasoning and ruling of the Court in Screen Extras Guild, Inc. v. Superior Court, 800 P.2d 873 (Cal 1990), which made clear that the threshold question is whether the plaintiffs' claim conflicts with the LMRDA's policy:

> Congress must have intended that elected union officials would retain *unrestricted freedom to select business agents, or, conversely, to discharge business agents* with whom they felt unable to work or who were not in accord with their policies.

Packowski, at 141, *quoting* Screen Extras, at p. 876-877.

The applicability of this preemption doctrine does not depend on the whether the Union's stated reason for the employment action complained of was "policy" related. Packowski adopted the ruling in Screen Extras that the union's stated reason for the termination of a business agent and whether it related to matters of union "policy" is not relevant to the question of whether LMRDA preemption applies. Indeed, Screen Writers expressly rejected the argument that the *nature* of the termination determines whether or not preemption applies. The Court held that it would be "impossible" to develop an "objective" test that determines whether or not a termination was "policy" related. Packowski, at 142, *citing* Screen Extras.

Under the rationale for the ruling in Packowski and related cases, the factors used to determine whether LMRDA preemption applies are: (1) Is the plaintiff claiming he was discharged for improper reasons? (2) Was the plaintiff a policy making or policy implementing

employee (such as a business agent)? and (3) Was the employment action taken by an elected union official?

Indeed, Packowski quoted the following language from Screen Extras setting forth the test as to whether preemption applies:

> To allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent. This would frustrate full realization of the goal of union democracy embodied by the LMRDA, in contravention of the supremacy clause. Consequently, the LMRDA and the supremacy clause preempt wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees.

Packowski at 142, *quoting* Screen Extras, at 881.

This Court in Packowski summarized the factors to be used in determining whether preemption applies as follows:

> In sum, the cases finding preemption under similar circumstances are more numerous, more analogous on their facts, and more persuasive than the cases finding no preemption by the LMRDA of similar wrongful discharge claims. The cases finding preemption of state common-law claims by the LMRDA illustrate that wrongful discharge claims by discharged or demoted union employees, who were in policymaking or policy-implementing positions, would counteract one of the purposes and goals of the LMRDA, namely, the purpose and goal of protecting democratic processes in union leadership. If union members cannot choose their leaders, or if the chosen leaders cannot then implement the policies they were elected to implement, then the rights of union members (as represented by their elected leaders) would be thwarted, or at least diminished.

Id. at 148-149 (emphasis added).

Plaintiffs herein, as business agents, were policy implementing employees of the Defendant Union. It likewise is undisputed that the decision maker in the present case was an elected union official who had the discretion to hire his own staff.

B. It makes no difference that Plaintiffs' claims are premised upon the WPA – all retaliatory/wrongful discharge claims interfere with the purpose of LMRDA

The Court of Appeals in the present matter held that, although Packowski held a wrongful discharge claim based on the violation of a contractual "just cause" policy to be preempted, the Plaintiffs' WPA claims in the present case do not fall under that ruling and are not preempted. The trial court's denial of the Summary Disposition Motions similarly were premised upon its conclusion that a statutory Whistleblower Act claim upon which the Complaint is premised does not fall under the preemption doctrine addressed in Packowski. The Court of Appeals and trial court erred because there should be no distinction between a wrongful discharge claim and a WPA claim in this context.

Clearly, the LMRDA policy that gives rise to the preemption doctrine recognized in Packowski is implicated by any claim that the union official did not have the right to hire or fire the union employee. If a plaintiff's claim is premised upon the allegation that the union did not have the right to demote or terminate him, that claim directly implicates the LMRDA policy that union officials are to have unfettered discretion to make employment decisions regarding policy-implementing individuals; thus triggering LMRDA preemption.

Furthermore, opinions adopted in Packowski expressly indicate that the preemption doctrine is not limited to "just cause" or contractual wrongful discharge claims. The opinion in Screen Extras stated that "the strong federal policy favoring union democracy, embodied in the LMRDA, preempts state causes of action for wrongful discharge **and related torts** . . . ." Screen Extras, 800 P.2d at 874 (emphasis added). Screen Extras thus makes clear that LMRDA preemption applies to actions for "wrongful discharge and related torts" and is not limited to the narrow category of contractual just-cause termination claims as Plaintiffs suggest. Significantly,

the Screen Extras opinion was expressly adopted in Packowski. *See* Packowski at 144 ("We conclude that the reasoning in *Screen Extras*, *Tyra*, *Vitullo*, *Smith*, and *Dzwonar* is persuasive, and we adopt the reasoning and apply it here").

Similarly, in Dzwonar v. McDevitt, 791 A.2d 1020 (NJ 2002) (another case expressly adopted in Packowski) the Court applied the preemption doctrine to a plaintiff's claims which were premised upon a state "anti-retaliation" statute like the Michigan Whistleblower statute relied upon by Plaintiffs in the present matter. The Dzwonar plaintiff brought claims under New Jersey's Conscientious Employee Protection Act ("CEPA") which prohibits employers from taking "retaliatory action against an employee because the employee [among other things] objects to . . . any activity . . . which the employee reasonably believes . . . is in violation of a law." Dzwonar, 791 A.2d at 1023.

The WPA at issue in the present case, like the New Jersey Conscientious Employee Protection Act at issue in Dzonwar, prohibits employers from terminating or discriminating against an employee because the employee reports or is about to report a violation of law to a public body. MCL 15.362.

Under the reasoning and cases expressly adopted in Packowski, the LMRDA preempts wrongful discharge and other related torts. As discussed below, the only exception to preemption arguably recognized in Packowski (for claims that the employee was terminated for failing or refusing to violate a criminal statute) is not relevant to or implicated in Plaintiffs' WPA claims here. The Court of Appeals in the present matter should have applied its prior ruling, reasoning and cases adopted in Packowski to hold that Plaintiffs' WPA claims are preempted. *See, e.g.,*, MCR 7.215(J)(1) ("*Precedential Effect of Published Decisions.* A panel of the Court

of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued . . . .").

C. The exception recognized by some courts – where a claim is based upon an employee's unwillingness to aid his superior in the violation of a criminal statute – does not apply here

The only exception to preemption arguably recognized by the Court of Appeals in Packowski applies in the narrow circumstance where the union employee alleges he was terminated for failing or refusing to aid or participate in the violation of a criminal statute. Packowski quoted the case of Bloom v Gen. Truck Drivers, Office, Food & Warehouse Union, Local 952, 783 F.2d 1356 (9th Cir. 1986) as follows:

> The [*Bloom*] court stated that there was an exception to preemption "to the extent a claim is based on an employee's unwillingness to aid his superior in the violation or concealment of a violation of a criminal statute." Id. at 1356 (emphasis added).

Packowski, at 145, *quoting* Bloom, 783 F.2d at 1356.[15]

Packoski also quoted language from the case of Montoya v Local Union III of the Int'l Brotherhood Electrical Workers, 755 P.2d 1221 (Colo App 1988), as follows:

> [T]he [Montoya] court held that the doctrine of preemption did not bar the plaintiff's wrongful discharge claim "insofar as he allege[d] that he was discharged because he refused to aid [the business manager] in his alleged criminal misuse of union funds." Id. at 1224.

---

[15]The Bloom Court reached this conclusion based on its analysis of the three "savings" clauses contained within the LMRDA which except certain types of state law claims from preemption. *See* Bloom, 783 F.2d at 1360-1361 and discussion, *infra.* The Bloom Court observed that those clauses save only state *criminal* laws and actions by union *members.* Because, like the present case, the Bloom plaintiffs brought their actions to protect their interests as union employees (not as members) and did not involve a prosecution for a state criminal law, the Bloom Court held that those clauses did not "directly" save the plaintiff's civil action. *Id.* By applying a 9th Circuit "balancing" test, however, the Court concluded that these "savings" clauses "implied" the continued vitality of a state's means of enforcing its criminal statutes, which included a cause of action of wrongful discharge for refusal to acquiesce or abet in the violation of a criminal. *Id.* at 1361.

Packowski, at 146, *quoting* Montoya, 755 P.2d at 1224 (emphasis added).

Packowski distinguished the facts in that case from Bloom and Montoya by noting that there was no claim in Packowski that the plaintiff was terminated for refusing to commit criminal conduct.

Moreover, Packowski adopted the decision in Dzonwar, *supra*, which adopted the narrow preemption exception set forth in Bloom. *See* Dzonwar at 1025 ("We adopt the *Bloom* exception to federal preemption to the extent a claim is based on an employee's unwillingness to aid his superior in the violation or concealment of a violation of a criminal statute") (emphasis added). Applying this exception, Dzonwar excepted the plaintiff's claims from preemption *only* "insofar as he allege[d] that he was discharged because he refused to aid [the business manager] in his alleged criminal misuse of union funds." All other aspects of the Dzonwar plaintiff's claim under New Jersey's "Conscientious Employee Protection Act," however, were held preempted.

Plaintiffs' WPA claims at issue in the present appeal clearly do not fall under this exception discussed in Packowski. Plaintiffs' previous allegations and contacts with the Department of Justice did not relate to claims of criminal "theft" or "embezzlement." As the Complaint allegations and Plaintiff depositions establish, Plaintiffs complained about issues of providing proper *fall protection* to Union members appearing at the property; and issues over whether individuals who appeared were paid the correct amounts from the correct funds. Plaintiffs' recent attempt to characterize their concerns as relating solely or primarily to an issue of "theft" or "embezzlement" is an erroneous, after-the-fact attempt to convert their conduct into the narrow exception to the preemption doctrine discussed above.

In any event, Plaintiffs Henry and White (Case No. 302373) make no claim in their Complaint that they were wrongfully discharged for *refusing to engage* or *aid* in the violation of

a criminal statute. In Case No. 302710 (filed by Plaintiffs Ramsey and Dowdy) the only claim that even arguably falls under this category is the claim by Plaintiff Ramsey in Count II that he allegedly was retaliated against for allegedly refusing to testify falsely at his deposition. Defendants, however, did not seek dismissal of this claim in the Summary Disposition Motion at issue. Consequently, all claims that were the subject of the summary disposition motion in Case No. 302710 are preempted and should have been dismissed by the trial court.

Plaintiffs' WPA claims are not premised on any contention that they were terminated for their refusal or "unwillingness" to "aid" their superior in the "violation or concealment of a violation of a criminal statute." The single exception arguably recognized in Packowski clearly does not apply to the Summary Disposition Motions at issue.

D. The "savings clauses" in the LMRDA do not save Plaintiffs' claims

The trial court referenced the "savings clause" contained within the LMRDA to hold that WPA claims are not preempted by the LMRDA. And the exception to preemption recognized by some courts for terminations based on a plaintiff's refusal or unwillingness to aid in the violation a criminal statute, is based on the language of the LMRDA's savings clauses. *See* Bloom, 783 F.2d at 1360-1361 and footnote 15, *supra.*

Scrutiny of the express language of the three savings clauses in the LMRDA, however, demonstrates that they do not apply to Plaintiffs' WPA claims. *See* 29 U.S.C. §§ 413, 523, and 524. Sections 413[16] and 523(a)[17] save state laws (and other federal laws) protecting the rights of

---

[16]29 U.S.C. § 413, entitled "Retention of existing rights of members," states: "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization" (emphasis added).

[17]29 U.S.C. § 523(a) states in relevant part: "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members

union *members* – not causes of actions to enforce rights of union *employment* – as Plaintiffs are attempting here. Furthermore, 29 U.S.C. § 524,[18] saves only state criminal laws and therefore does not save Plaintiffs' civil WPA claims.

Application of the express language of the savings clauses contained within the LMRDA, therefore, establish that Plaintiffs' state law civil WPA claims, brought as employees of the union, are not saved from preemption. *See, e.g.,* Bloom, 783 F.2d at 1360; Finnegan, 456 U.S. at 441. Under the express language of those savings clauses, even the exception recognized in Bloom, *supra*, and other cases, for claims based on an employee's unwillingness to aid his superior in the violation or concealment of a violation of a criminal statute, is not provided for.

E. It would interfere with federal labor policy, as set forth in the LMRDA and/or NLRA, to except Plaintiffs' WPA claims from LMRDA preemption

The LMRDA establishes a federal scheme that protects the rights of union members through a careful balancing of various rights and remedies. For example, as held by Finnegan, Plaintiffs, as Union *members*, had certain protected rights as *members* and the right not to be disciplined with regard their union *membership* for exercising such rights. Finnegan, 456 U.S. at 441. Under that same scheme, however, in order to protect the rights of union members, Union management had the ability "to choose a staff whose views are compatible with his own." Finnegan, 456 U.S. at 441. Moreover, under Finnegan, while the LMRDA permits union members to bring a cause of action for a violation of his or her *membership* rights established

---

of a labor organization are entitled under such other Federal law or law of any State" (emphasis added).

[18]29 U.S.C. § 524 is entitled "Effect on State laws" and states: "Nothing in this chapter shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes" (emphasis added).

thereunder, it does not provide a cause of action for loss of Union employment by a union business agent when terminated by an elected union officer. *Id.* at 440-441.

Furthermore, as discussed *infra,* while the LMRDA has express "savings" clauses that except from LMRDA preemption state laws protecting the rights of union members and state enforcement of its criminal laws, those savings clauses do not mention state laws permitting civil wrongful discharge or whistleblower claims by union employees.

To allow a state law whistleblower claim to proceed in this case would conflict and impermissibly interfere with the LMRDA's scheme protecting union democracy and the ability of union officers to choose his or her own staff. Furthermore, the federal interest in this case is especially strong, and the state interest relatively weak, in light of the fact that the activities giving rise to Plaintiffs' alleged WPA claims involve labor matters traditionally governed by federal labor laws, *e.g.,* federally protected concerted activity, alleged violations of a collective bargaining agreement and an alleged violation of the federal LMRDA. *See* discussion of Garmon preemption, *supra.*

RELIEF REQUESTED

Defendant Ruedisueli concurs and joins in the appeal brief filed by Appellants Aaron and the Union in these consolidated cases. For the reasons stated herein and/or in the appeal brief filed by Appellants, the Summary Disposition Motions filed by Defendants in both trial court case numbers should have been granted in their entirety. Ruedisueli otherwise respectfully requests that, given the clear error below and/or federal labor law preemption doctrines addressed by Appellants and herein, this Court reverse the decision of the Court of Appeals in this matter and/or reverse the trial court's orders denying Defendants' Motions for Summary Disposition and/or otherwise rule that:

1. The entire Complaint in Case No. 302373 is preempted and should have been dismissed by the trial court as outside its subject matter jurisdiction; and

2. The Complaint in Case No. 302710 (with the exception of the claim by Plaintiff Ramsey in Count II) is preempted and should have been dismissed by the trial court as outside its subject matter jurisdiction.

Respectfully submitted,

LAW OFFICES OF J. DOUGLAS KORNEY

By:_____

J. Douglas Korney (P16155)
Attorneys for Defendant Bruce Ruedisueli
32300 Northwestern Highway, Suite 200
Farmington Hills, MI 48334-1567
248-865-9214
dkorney@appriver.net
Dated: April 12, 2013

R:\M3000.016\SUPREME COURT\APPEAL BRIEF FINAL.DOCX

EXHIBIT A

Not Reported in N.W.2d, 2005 WL 1685103 (Mich.App.)
(Cite as: 2005 WL 1685103 (Mich.App.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.
Bruce PIERSON and David Gaffka, Plaintiffs/Counterdefendants-Appellants/Cross-Appellees,
v.
Andre AHERN, Defendant/Counter-plaintiff/Third-Party Plaintiff-Appellee/Cross-Appellant,
and
Tokio OGIHARA and Ogihara America Corporation, Third-Party Defendants-Cross-Appellees.

No. 260661.
July 19, 2005.

Before: FITZGERALD, P.J., and METER and OWENS, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiffs appeal as of right, and defendant cross appeals, from the trial court's order granting defendant summary disposition on plaintiffs' first amended complaint, and granting plaintiffs' motion for summary disposition of defendant's counter-complaint. We affirm.

Plaintiffs commenced this action for defamation after defendant allegedly sent a package of materials to third-party defendant Tokio Ogihara, president of third-party defendant Ogihara America, where plaintiffs and defendant were employed. The package consisted of a letter that allegedly disparaged plaintiff David Gaffka's work performance and photographs that allegedly showed examples of his poor workmanship. The return address label on the package listed plaintiff Bruce Pierson as the sender. The company investigated the incident, concluded that defendant was the actual sender of the package, and subsequently discharged him for violating the company's code of conduct. Defendant filed a countercomplaint and a third-party complaint alleging claims for contribution, [FN1] abuse of process, conspiracy to abuse process, and discharge in violation of public policy. The trial court dismissed plaintiffs' first amended complaint pursuant to MCR 2.116(C)(8) (failure to state a claim), and dismissed defendant's countercomplaint and third-party complaint pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction).

FN1. This claim is not at issue on appeal.

Plaintiffs first argue that the trial court erred in dismissing their defamation claims under MCR 2.116(C)(8). A trial court's decision regarding summary disposition is reviewed de novo. *Corley v. Detroit Bd of Ed,* 470 Mich. 274, 277; 681 NW2d 342 (2004). A motion under MCR 2.116(C)(8) challenges the legal sufficiency of the claim based on the pleadings alone. *Id.*

To establish a defamation claim, a plaintiff must show (1) a false and defamatory statement about the plaintiff, (2) an unprivileged publication to another party, (3) fault amounting at a minimum to negligence on the publisher's part, and (4) either actionability of the statement regardless of special harm or the existence of special harm as a result of the publication. *Kevorkian v. American Medical Ass'n,* 237 Mich.App 1, 8-9; 602 NW2d 233 (1999). The complained-of statements must be pleaded with specificity. *Royal Palace Homes, Inc v. Channel 7 of Detroit, Inc,* 197 Mich.App 48, 53-54, 56-57; 495 NW2d 392 (1992). In their first amended complaint, plaintiffs alleged that defendant sent a package of allegedly defamatory materials consisting of a letter and photographs to Ogihara, but plaintiffs did not attach copies of the letter or photographs, or describe their substance in their complaint. We agree with the trial court that plaintiffs failed to plead a claim of defamation with sufficient spe-

cificity regarding the allegedly defamatory statements. *Id.* Summary disposition was proper under MCR 2.116(C)(8).[FN2]

> FN2. Although plaintiffs assert that the trial court improperly looked beyond the pleadings, the trial court's reference to matters outside the pleadings was made only in the context of the court's independent ruling that if it were to consider plaintiffs' proposed second amended complaint, those claims would not be sustained because there was no genuine issue of material fact regarding whether plaintiffs were injured. There is no indication in the trial court's opinion that the court considered any documents beyond the pleadings when granting summary disposition of plaintiffs' first amended complaint under MCR 2.116(C)(8) for failure to state a cause of action.

Plaintiffs also argue that the trial court erred in denying their motion to amend their complaint. In its opinion, the trial court stated that even if it had allowed plaintiffs to file their proposed second amended complaint, it would have found that summary disposition was still proper because, with regard to plaintiffs' defamation claims, plaintiffs "failed to present sufficient evidence alleging a question of material fact of the defamatory nature of the letter and photographs." In essence, the trial court concluded that even if plaintiffs had filed their proposed second amended complaint, summary disposition was warranted under MCR 2.116(C)(10). Plaintiffs claim the court's decision was erroneous because it required plaintiffs to prove economic damages even though plaintiffs had pleaded defamation per se when they pleaded damage to their professional standing. We disagree.

*2 Defamation per se does not require proof of damages because injury is presumed. *Burden v Elias Bros Big Boy Restaurants,* 240 Mich.App 723, 728; 613 NW2d 378 (2000). Citing *Glazer v. Lamkin,* 201 Mich.App 432, 438; 506 NW2d 570 (1993), plaintiffs argue that defamation with respect to professional standing is slander per se. The Court in *Glazer, supra* stated, "Slander (libel) per se exists where the words spoken (written) are false and malicious and are injurious to a person in that person's profession or employment." *Id.,* citing *Swenson-Davis v. Martel,* 135 Mich.App 632, 635; 354 NW2d 288 (1984). Injurious is defined as "1. harmful, hurtful, or detrimental, as in effect ... 2. insulting; abusive; defamatory." *Random House Webster's Dictionary* (2001). The first definition indicates that there has to be a harmful effect; however, the second definition, which actually lists defamatory, does not necessarily indicate that there has to be a harmful result. The need to demonstrate a harmful result or effect does not appear to coincide with the per se concept of presumed injury.

Nevertheless, quoting MCL 600.2911(2)(a), the *Glazer* Panel also stated that a plaintiff " 'is entitled to recover only the actual damages he or she has suffered." ' *Glazer. supra* at 436. The statute provides that a plaintiff may only recover for actual damages suffered "in respect to his or her property, business, trade, profession, occupation, or feelings." MCL 600.2911(2)(a). The statute separately indicates that words imputing lack of chastity or commission of a criminal offense "are actionable in themselves." MCL 600.2911(1). Because the statute allows recovery only for actual damages for defamation regarding one's profession; the statute lists per se actions separately under a different subsection; and this Court in *Glazer, supra* indicated actual damages must be proven, plaintiffs here were required to show actual damages, and the instant court appropriately found that plaintiffs failed to do so.

On cross appeal, defendant argues that the trial court erred in determining that his claims for abuse of process, conspiracy to abuse process, and discharge in violation of public policy, were preempted by the National Labor Relations Act (NLRA), 29 USC 151 *et seq.* We review de novo whether a court has subject-matter jurisdiction. *Calabrese v*

Tendercare of Michigan, Inc, 262 Mich.App 256, 259; 685 NW2d 313 (2004).

As this Court observed in *Calabrese, supra* at 260, under the United States Supreme Court's decision in *San Diego Building Trades Council v Garmon,* 346 U.S. 485; 74 S Ct 161; 98 L Ed 228 (1959), a state claim is preempted when it concerns

> "an activity that is actually or arguably protected or prohibited by the NLRA. The state claim may survive, however, if the conduct at issue 'is of only peripheral concern to the federal law or touches interests so deeply rooted in local feeling and responsibility....' The court balances the state's interest in regulating or promoting a remedy for the conduct against the intrusion in the NLRB's [National Labor Relations Board's] jurisdiction and the risk that the state's determination will be inconsistent with provisions of the NLRA. [Quoting *Bullock v Automobile Club of Michigan,* 432 Mich. 472, 493; 444 NW2d 114 (1989) (footnotes omitted).]

***3** If the controversy pertains to a matter identical to one that could be presented to the NLRB under the NLRA, state exercise of jurisdiction necessarily involves a risk of interference with the NLRB's jurisdiction and is precluded. *Calabrese, supra* at 261.

Section 157 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations...." 29 USC 157. Additionally, § 158 of the NLRA states, in pertinent part:

> (a) It shall be an unfair labor practice for an employer-
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it ...;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...;
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter. [29 USC 158.]

Defendant's countercomplaint alleges that plaintiffs and third-party defendants conspired to abuse the judicial process by initiating this lawsuit for ulterior motives, namely, to retaliate against him for his union activity and for testimony he gave before the NLRB that was against his employer's interest, to intimidate him and others from engaging in union activities, and to discover the names of other union supporters in order to retaliate against them. Defendant further alleges that he was terminated because of his participation in unionizing activities. Looking at the gravamen of defendant's countercomplaint, the trial court correctly determined that defendant's claims fell within the purview of the NLRA by alleging unfair labor practices. The alleged actions by the third-party defendants are precisely the type of employer conduct that the NLRA seeks to prohibit under §§ 157 and 158 of the NLRA.

Defendant's argument that the trial court erred by not performing the balancing test set forth in *Calabrese, supra,* is without merit. The balancing test is utilized only when the claim is of peripheral concern to the NLRA or affects interests deeply rooted in local feeling and responsibility. *Belknap, Inc v. Hale,* 463 U.S. 491, 498; 103 S Ct 3172; 77 L.Ed.2d 798 (1983). Here, the trial court properly concluded that it was unnecessary to engage in the balancing test because "the claims concern activities that are actually protected or prohibited by the NLRA."

We reject defendant's argument that his claims are "so deeply rooted in local feeling and responsibility" that they are actionable in state court. This

exception to the *Garmon* preemption doctrine has been construed narrowly, in favor of the broad, exclusive jurisdiction of the NLRB. *Int'l Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 391-393; 106 S Ct 1904; 90 L.Ed.2d 389 (1986). Claims that have been held to fall within the exception involve state laws regulating violence, defamation, intentional infliction of emotional distress, trespassory picketing, and obstruction of access to property. *Sears, Roebuck & Co v San Diego Co Dist Council of Carpenters,* 436 U.S. 180, 204, 207; 98 S Ct 1745; 56 L.Ed.2d 209 (1978). Regardless of defendant's characterization of his claims, at their core they involve his participation in unionizing activities, the very subject matter of the NLRA.

***4** Lastly, we find no merit to defendant's contention that his claim for discharge in violation of public policy is not preempted. In *Calabrese, supra,* the plaintiff alleged that she was wrongfully terminated because she would not fire employees for engaging in unionizing activities. She filed suit asserting claims for wrongful discharge and tortious interference with business relations. *Calabrese, supra* at 258-259. The plaintiff contended that she was terminated in violation of public policy. *Id.* at 259. This Court concluded that the plaintiff's claims constituted allegations of unfair labor practices under the NLRA and, thus, were preempted under the *Garmon* doctrine. *Id.* at 262-263. There are no distinguishing factors in this case that would compel a different result here. Accordingly, the trial court properly dismissed defendant's countercomplaint and third-party complaint for lack of subject-matter jurisdiction.

Affirmed.

Mich.App.,2005.
Pierson v. Ahern
Not Reported in N.W.2d, 2005 WL 1685103 (Mich.App.)

END OF DOCUMENT